In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 233

DIXIE CARRIERS, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO MOTION TO AFFIRM

STATEMENT

This appeal, filed by various water carriers, seeks review of a judgment of a three-judge district court affirming an order of the Interstate Commerce Commission. The United States, although it is an appellee in these proceedings, believes that the case presents an issue of importance under the Interstate Commerce Act and that probable jurisdiction should be noted. The pertinent facts are as follows:

Sulphur is mined in large quantities near Galveston, Texas and can be shipped from the mine

to Danville, Illinois either by rail or by rail and barge. The rail-barge route is by rail from the mine to Galveston, and by barge from Galveston to East St. Louis, Illinois, and then by rail to Danville. The total charge for such movement is $9.77 per ton, consisting of rail and loading charges of $1.50 from the mines to Galveston, the barge rate of $5.32 from Galveston to East St. Louis, and the local rail rate of $2.95 from East St. Louis to Danville. Although the total of the local rates for all-rail shipments from the mines to Danville is $11.70,[1] the railroads have established a joint all-rail rate of $9.184. Since 1951, when a contract barge carrier discontinued operations, all sulphur has moved over the all-rail route.

Appellants, common carriers by water, operate between Galveston and East St. Louis. In December 1950 they filed a complaint with the Interstate Commerce Commission alleging that the existing rail-barge rates on sulphur were unreasonable and that the refusal of the railroads to establish through rail-barge routes and joint rates on the traffic discriminated against the barges as connecting carriers, in violation of Sections 1, 3(4), and 307(d) of the Interstate Commerce Act.[2] Appellants re-

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[1] The local rail rate is $8.75 from the mines to East St. Louis, and $2.95 from the latter to Danville.

[2] Section 1(4) of the Act requires rail carriers to establish "reasonable through routes" with water carriers, and "just and reasonable rates" applicable thereto. Section 3(4) provides that all rail carriers "shall not discriminate in their rates, fares, and charges between connecting lines * * *," which are defined to include "any common carrier by water sub-

quested the Commission to establish a through rail-barge route from Galveston to Danville and a joint rate, which they suggested be fixed at $7.67. The cost for rail-barge-rail shipments from the mine to Danville under that proposed rate would be $9.17, as against the all-rail rate of $9.184.

After hearing, the Commission (three commissioners dissenting) dismissed the complaint. *American Barge Line Co.* v. *Chicago and Eastern Illinois R. R. Co.*, 291 I.C.C. 422 (affirming 287 I.C.C. 403). The Commission held (p. 423) that since no shipper had shown any interest in the rate sought and the all-rail rate was on a depressed basis, it was not "necessary or desirable in the public interest" to establish through routes and joint rates. It further held (*ibid.*) that the record afforded no support for finding that the present combination rail-barge rate was unreasonable. The Commission also rejected the claim of discrimination. Declaring that this claim rests on the fact that "the separately established rate paid by the shipper on ex-barge traffic beyond East St. Louis is greater

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ject to part III". Section 307(d) directs the Commission, whenever it deems it "necessary or desirable in the public interest" to establish through routes and joint rates "applicable to the transportation of passengers or property by common carriers by water, or by such carriers and carriers by railroad * * * and the divisions of such rates * * *, and the terms and conditions upon which such through routes shall be operated." Section 307(d) further directs the Commission, in the case of a through route between rail and water carriers, to prescribe such "reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carriers by water."

than the unpublished division of a joint through all-rail rate received by the rail carrier for the transportation beyond East St. Louis on ex-rail traffic moving from the same origin to the same destination," it ruled that divisions of joint rates are not "rates" or "charges" within the meaning of Section 3(4) (p. 424).

On appeal, a three-judge district court upheld the Commission's order. The court held (1) that the Commission's findings were adequate and were supported by the evidence, and (2) that, on its own independent consideration of the record, the court had concluded that establishment of the proposed routes and rates would not be in the public interest, and that the existing rates were not discriminatory.

DISCUSSION

The Commission's findings in this case show that although the combination all-rail rate on sulphur is substantially *higher* than the rail-barge rate, the railroads have established a joint all-rail rate which is substantially *lower* than the rail-barge rate, but have refused to establish a comparable rail-barge through route and joint rate. The result has been to eliminate the barges from carrying the traffic. The important issue presented by this appeal is whether under such circumstances the Interstate Commerce Act requires the Commission to establish through rail-barge routes and joint rates in order to effectuate the National

Transportation Policy that the Act is to be administered so as to preserve the "inherent advantages" of each form of transportation.[3] We believe that this Court's decision in *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567, requires an affirmative answer.

In the *Mechling* case, the Court invalidated a Commission order which approved higher rail rates for the transportation of grain east from Chicago if it arrived at Chicago by barge rather than by rail or lake steamer. The grain moved on through bills of lading from the west to eastern destinations, and the charge for the movement from Chicago to the east was a "proportional" rate which was lower than the "local" rate for shipments to the east which originated in Chicago.[4] The Court

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[3] The question whether a rail carrier's refusal to establish reasonable divisions with one of two connecting carriers may constitute discrimination prohibited by Section 3(4) arises only if through routes and joint rates already exist. Here such routes and rates do not exist between the barge and rail carriers. Moreover, it is clear that the source of appellants' competitive injury is not the disparity between the division of the joint all rail rate and the local rail rate which the barge traffic pays, but the fact that there is a joint all-rail rate which is substantially lower than the total of the local rail rates.

Similarly, the question of what is the "reasonable differential" which Section 307(d) requires the Commission to prescribe between the all-rail and the rail-barge through route arises only after through routes have been established.

[4] The "proportional" rate previously had been the same for ex-barge and ex-rail grain.

held (p. 577) that the pertinent provisions of the Interstate Commerce Act [5] "flatly forbid the Commission to approve barge rates or barge-rail rates which do not preserve intact the inherent advantages of cheaper water transportation, but discriminate against water carriers and the goods they transport," and that Congress "has declared in unmistakable terms that the 'inherent advantage' of the lower cost of barge carriage as compared with that of railroads must be passed on to those who ship by barge" (p. 579). It rejected the Commission's "assumption that the congressional prohibitions of railroad rate discriminations against water carriers were not applicable to such discriminations if accomplished by through rates" (p. 577), since "Congress left the Commission no discretionary power to approve any type of rates which would reduce the 'inherent advantage' of barge transportation in whole or in part" (p. 579).

It thus appears that the *Mechling* case stands for the broad proposition that the Act outlaws any rate system which prevents shippers from obtaining the benefits of the "inherent advantage" of barge transportation, namely, its lower cost. It would seem immaterial whether such discrimina-

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[5] These provisions include, in addition to the sections cited *supra*, note 2, the National Transportation Policy, which declares that the Interstate Commerce Act is to be administered so as to "recognize and preserve the inherent advantages of each" "mode[s] of transportation."

tion results from the establishment of a higher proportional rate on ex-barge than on ex-rail traffic (as in the *Mechling* case), or from the failure of rail carriers to establish through routes with a connecting barge line while at the same time maintaining such routes with a connecting rail carrier in competition with the barge line (as in the case at bar). For Congress gave the Commission no power to approve "*any type of rates* which would reduce the 'inherent advantages' of barge transportation" (emphasis added).

In sanctioning the rail-barge rate system here involved, the Commission has seemingly departed from the principle stated in *Mechling*, that the Act "must be administered as to preserve, not eliminate or reduce the disparity" between rail-barge rates and local rail rates which the "inherent cheapness of the barge leg of the through route produces" (330 U.S. at 580). The rail-barge-rail combination rate of $9.77 is approximately $2.00 less than the all-rail combination rate of $11.70, and this differential presumably reflects the lower cost of the barge segment of the journey. But the railroads' refusal to establish a joint rail-barge rate, while continuing to maintain joint all-rail rates of $9.18, has effectively eliminated the barges as a competitive factor on this traffic. In short, the practical effect of the Commission's refusal to prescribe through rail-barge routes and joint rates has been to deny "to those who ship by barge"

"the 'inherent advantage' of the lower cost of barge carriage" (*id.*, p. 579).

Section 307(d) of the Act directs the Commission, whenever it is "necessary or desirable in the public interest," to establish through routes and joint rates "applicable to the transportation of passengers or property by common carriers by water * * * and carriers by railroad * * * ." We believe that it was "necessary or desirable in the public interest" to establish a through rail-barge route and a joint rate in this case because such route and rate are required to "preserve the 'inherent advantages' " of water transportation (National Transportation Policy). Moreover, we think that Section 307(d) required the Commission to fix such joint rail-barge rate so that the differential between it and the all-rail rate would fully reflect the lower cost of the barge segment of the journey. Cf. *Alabama G.S.R. Co.* v. *United States*, 340 U.S. 216. While the amount of such differential is, in the first instance, for the Commission to determine, it appears, at the least, that the rail-barge-rail rate should be no higher than all-rail transportation. Finally, we note that the rail carriers' refusal to establish through routes and joint rates with the barge lines may result in discrimination in "rates" and "charges" in violation of Section 3(4), whether or not a "division" of a rate is itself a "rate" or "charge" within that section.

We submit that, for the foregoing reasons, the

motions to affirm should be denied and probable jurisdiction of the appeal should be noted.[6]

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.
STANLEY N. BARNES,
Assistant Attorney General.
DANIEL M. FRIEDMAN,
FREDERICA BRENNEMAN,
Attorneys.

SEPTEMBER, 1955.

[6] If probable jurisdiction is noted the United States, which took a neutral position in the district court, intends to participate in the appeal in support of appellants.

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